

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KATHLEEN M. TEPPER,

Plaintiff-Appellant-Cross Appellee,

v

RIVERSIDE OSTEOPATHIC HOSPITAL,

Defendant-Appellee-Cross  
Appellant.

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UNPUBLISHED

October 16, 2003

No. 242124

WCAC

LC No. 01-000374

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate's order granting plaintiff an open award of benefits. We affirm.

I

Plaintiff suffered a slip and fall during her employment with defendant. Plaintiff filed four Applications for Hearing with the Bureau of Workers' Disability Compensation. The first application was voluntarily dismissed when the parties entered into a Voluntary Pay Agreement. The second application requested vocational rehabilitation services, which plaintiff received. In the third and fourth applications, plaintiff sought a correction of the rate by which defendant was voluntarily paying her differential benefits.

In deciding the third and fourth applications, the magistrate held that the entire value of plaintiff's discontinued fringe benefits must be added to her cash weekly wage for purposes of computing her partial wage loss benefits. The magistrate also found that plaintiff was entitled to ongoing wage loss benefits for her back injury.

Defendant appealed and the WCAC reversed the magistrate's decision. The WCAC held that the magistrate improperly included discontinued fringe benefits when calculating plaintiff's pre-injury after-tax average weekly wage, contrary to MCL 418.371(2). Additionally, the WCAC held that the magistrate lacked jurisdiction to determine whether plaintiff was entitled to ongoing wage loss benefits. This Court granted plaintiff leave to appeal. Defendant filed a cross-appeal.

## II

Relying on this Court's decision in *Hite v Evart Products Co*, 34 Mich App 247, 253; 191 NW2d 136 (1971), plaintiff argues that the two-thirds limitation in MCL 418.371(2) is inapplicable to the calculation of her benefit rate because MCL 418.301(5) and MCL 418.361(1), the Worker's Disability Compensation Act (WDCA) provisions governing reasonable employment and partial disability, do not specifically limit her benefit rate. We disagree.

This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(14). We review questions of law arising in any final order of the WCAC under a de novo standard of review. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 697 n 3; 614 NW2d 607 (2000), citing *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000). "Although this Court will ordinarily defer to the WCAC's interpretation of a provision of the [ ] WDCA, we will not afford such deference where the WCAC's interpretation of the pertinent statute is clearly incorrect." *Maier v General Telephone Company of Michigan*, 247 Mich App 655, 660; 637 NW2d 263 (2001) citing *Tyler v Livonia Public Schools*, 459 Mich 382, 388; 590 NW2d 560 (1999).

MCL 418.301(5)(b) governs the situation where a claimant returns to work and receives wages less than her average weekly wage:

If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

MCL 418.361(1) applies to calculating benefits of partially disabled employees who have returned to work. MCL 418.361(1) provides the following:

While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

Both MCL 418.301 and MCL 418.361 refer to the term, "after-tax average weekly wage." MCL 418.313 instructs that, "[a]s used in this act, 'after-tax average weekly wage' means [']average weekly wage['] as defined in section 371." MCL 418.371(2), provides:

As used in this act, "average weekly wage" means the weekly wage earned by the employee at the time of the employee's injury in all employment, inclusive of overtime, premium pay, and cost of living adjustment, and exclusive of any fringe or other benefits which continue during the disability. Any fringe or other benefit

which does not continue during the disability shall be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount which is greater than 2/3 of the state average weekly wage at the time of injury.

Here, there is no dispute that plaintiff's fringe or other benefits did not continue during the disability, and consequently, are properly included for purposes of determining her average weekly wage. MCL 418.371(2) specifically provides that fringe or other benefits are included "to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount which is greater than 2/3 of the state average weekly wage at the time of injury." Because plaintiff's pre-injury average weekly wage produced a benefit rate greater than two-thirds of the state average weekly wage without the addition of discontinued fringe benefits, the magistrate erred when he included the discontinued fringe benefits. Therefore, the WCAC properly reversed the magistrate's decision because post-injury employment does not affect pre-injury average weekly wage calculations.

Moreover, plaintiff's statutory analysis is without merit. Accepting plaintiff's interpretation of MCL 418.371(2) would render meaningless the two-thirds limitation from the definition of average weekly wage. In construing a statute, the court should presume that every word has some meaning and should avoid any construction which would render any part of a statute surplusage or nugatory. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999). Plaintiff may not refer to the definition of average weekly wage as authority for including certain discontinued fringe benefits in the average weekly wage calculation without regard to the attendant statutory two-thirds limitation. Moreover, plaintiff's reliance on *Hite* is misplaced because *Hite* interpreted the prior version of section 371(2),<sup>1</sup> which did not include the two-thirds limitation but provided for inclusion of discontinued fringe benefits in the average weekly wage computation under all circumstances. *Hite, supra* at 252-253.

### III

Plaintiff also asserts that the magistrate was entitled to enter an open award of benefits in light of defendant's stipulation at trial to the existence of a work-related, ongoing partial disability from employment. We disagree.

MCL 418.841(1) provides in pertinent part that "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable."

Here, defendant was voluntarily paying plaintiff wage loss benefits, and plaintiff's applications for hearing only requested correction of the rate of differential benefits that defendant was voluntarily paying her. The "dispute or controversy" submitted to the magistrate was whether the rate by which defendant voluntarily paid plaintiff benefits was correct. The magistrate did not have jurisdiction to determine whether plaintiff was entitled to ongoing wage loss benefits. Defendant accurately summarized at the hearing the single issue presented by

<sup>1</sup> In 1981, the Legislature amended section 371 and inserted the two-thirds limitation. 1981 PA 192.

plaintiff in her petitions. In stipulating to plaintiff's partial disability, defendant contemplated only the facilitation of the single issue before the magistrate.

Therefore, the WCAC properly held that the magistrate lacked jurisdiction to enter an award of ongoing wage loss benefits.<sup>2</sup>

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood

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<sup>2</sup> Because we affirm the order of the WCAC, we need not address the issues raised in defendant's cross appeal.